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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 TRION JAMES,

4 Plaintiff,

5 v.

22 Civ. 2463 (PGG)

6 PORT AUTHORITY POLICE
7 DEPARTMENT, et al.,

8 Defendants.

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9 New York, N.Y.
10 February 2, 2023
10:00 a.m.

11 Before:

12 HON. PAUL G. GARDEPHE,

13 District Judge

14 APPEARANCES

15 BALESTRIERE FARIELLO
Attorneys for Plaintiff

16 BY: JOHN G. BALESTRIERE
RUTH CHUNG

17
18 PORT AUTHORITY LAW DEPARTMENT
Attorneys for Defendants

19 BY: ANDREW K. RAFALAF
MEGAN LEE

N22CjamC?

(Case called)

MR. BALESTRIERE: Good morning, your Honor. John Balestriere, along with my colleague, Ruth Chung, for the plaintiff, Trion James.

MS. LEE: Megan Lee, Port Authority, all Port Authority defendants, your Honor.

MR. RAFALAF: Andrew Rafalaf, also for the Port Authority defendants.

THE COURT: So, in this case, the plaintiff alleges discrimination retaliation under Title VII. Today we're having a status conference.

We were last together on November 3rd. The parties told me that discovery was proceeding appropriately. I inquired about whether there had been any discussions about settlement. The parties told me it was too early to have those conversations.

Defense counsel raised an issue about difficulty with plaintiff's medical records, haven't received them, et cetera.

The plaintiff is making a claim for emotional damages here. So the records sought appear to be relevant to me. I told the parties that I wanted the issue resolved so that depositions could proceed as scheduled in December. Plaintiff's counsel stated he didn't anticipate any issues in providing the necessary records to defense counsel before the deposition.

N22CjamC?

1 The original fact discovery deadline in the case was
2 January 31st of this year. On January 29th, plaintiff
3 requested an extension of that deadline to March 7th, 2023.
4 Plaintiff explained that it was necessary to obtain some
5 additional documents. They requested an extension, as I said,
6 of about a five-week period.

7 The defendant, for its part, said that it wants to
8 depose the plaintiff's ex-wife. Defendant also complains that
9 it still hasn't received plaintiff's therapy records, which are
10 the same records that we were talking about in November.

11 So, let me start with those therapy records because it
12 seems like they've been at issue for some time. Have you
13 obtained the records?

14 MR. RAFALAF: No, your Honor, and it's much more
15 egregious than that. If I could take two minutes of the
16 Court's time just to explain what the Port Authority has gone
17 through and the obstruction we have received. I'm not going to
18 bore you with what was discussed at the conferences.

19 Again, at the last conference, plaintiff's counsel
20 said they would get us those documents, and I think they said
21 in days, within days. Instead, three weeks later, we received
22 an email from another of plaintiff's counsel's colleagues, and
23 I'm just going to read this, and this was November, three weeks
24 later. I write, as I've learned of repeated attempts by PAPD
25 counsel to obtain the confidential medical records of our

N22CjamC?

1 client directly from his mental health professionals prior to
2 redaction. This is not proper. All requests for such
3 documents should go through me.

4 Subsequently, a week later, Thanksgiving Eve at 5:16
5 p.m., we received a total of seven documents from plaintiff's
6 counsel, they're Bates stamped, and they only go back to
7 February of 2022 – that will become important momentarily to
8 your Honor.

9 To keep discovery on track, the PA agreed to move
10 forward with plaintiff's deposition on December 7, we reserved
11 our right to continue the deposition subject to the production
12 of additional documents over plaintiff's counsel's objection.

13 We then had a meet and confer in the middle of
14 December with plaintiff's counsel. Subject to that, we
15 received a new medical authorization on December 15th, only
16 again for Dr. Marina Galea. This one was not restricted to
17 February 2022. To date, we have not received a single document
18 from Dr. Marina Galea. As such, with the Court's permission,
19 we will send out for service, by tomorrow, a subpoena for
20 Dr. Galea for the medical records and for her testimony.

21 Additionally, your Honor, turns out that Dr. Galea is
22 not the only treating medical professional. Through those
23 months of September, October, and November, plaintiff
24 identified one medical provider. In a deficiency letter that
25 we sent on November 23rd, we asked plaintiff's counsel to

N22CjamC?

1 confirm whether Dr. Galea was the only physician. They did not
2 respond. So it wasn't until December 7th at plaintiff's
3 deposition that plaintiff admitted that he was seeing or had
4 seen three other medical professionals in the responsive time
5 period, the relevant time period over the last 20 years for
6 emotional health issues: Dr. Frank Contacessa, his GP who has
7 prescribed psychotropic medication over the last decade;
8 Dr. Davila, another therapist plaintiff has seen; and
9 Dr. Taminze (ph.), a psychologist the plaintiff and his wife
10 occasioned prior to their divorce, which was finalized in
11 February 2022, the week or two before plaintiff stopped coming
12 to work for the alleged emotional issues he's suing herein.

13 We have received documents from Dr. Contacessa, but we
14 only received them two weeks ago. Again, with the Court's
15 permission, the PA would like to subpoena Dr. Contacessa solely
16 for his testimony to explain the notations, the comments in the
17 medical records. Dr. Davila, the therapist, is not responding
18 to us or our private investigator. I want to add, your Honor,
19 that we have hired a private investigator, the extraordinary
20 step, to get these medical records. So Dr. Davila is not
21 responding to us. And the marriage counselor told our private
22 investigator that he's not giving us any documents.

23 As such, with the Court's permission, we also would
24 like to subpoena both Dr. Davila and Dr. Ives for their records
25 and their testimony.

N22CjamC?

1 Dr. Contacessa's records, which we received only two
2 weeks ago, indicate that plaintiff has suffered from PTSD since
3 leaving the military I believe in the early 2000s.
4 Accordingly, we reiterate our prior demand that plaintiff
5 produce any medical documentation from the military concerning
6 any emotional health issues and provide the necessary releases
7 to get those medical records from the military.

8 Lastly, your Honor, I want to be clear here that the
9 PA does not believe that our continued efforts to obtain these
10 records should at all delay things from proceeding because
11 these issues will go to, obviously, damages. Whenever fact
12 discovery is complete and the parties are around, we are
13 prepared to move for summary judgment.

14 Thank you.

15 THE COURT: All right. Well --

16 MR. BALESTRIERE: May I, your Honor?

17 THE COURT: Yes.

18 MR. BALESTRIERE: I think the primary thing is
19 anything our client has, he's gotten to us, we have turned
20 over. So there's nothing from the doctors that we have held
21 back. I understand that Dr. Galea has -- and I'm getting this
22 from the Port Authority, because I've had no communications
23 with her or her office outside of, I think, maybe late
24 December, one of my colleagues said we cannot get involved
25 here, you should maybe speak to your own counsel about this.

N22CjamC?

1 So any issues with the doctors not turning things over is not
2 something we have interfered with.

3 I do have something I'd like to say about Dr. Galea at
4 the right time, your Honor.

5 THE COURT: Let me just cut to the chase here. It was
6 your client's decision to make a claim for emotional distress
7 damages and by doing so, the client made relevant his mental
8 health history.

9 I also note that, apparently, the plaintiff intends to
10 argue that his divorce from his wife relates to his alleged
11 suffering from the discrimination that is the subject of the
12 case.

13 Anyway, these issues have been opened up by the claim
14 for emotional distress damages and the defendant has a right,
15 given that the plaintiff has made such a claim, to obtain
16 information, both in the form of documents and testimony.

17 With respect to, they have a bearing on plaintiff's
18 claim that the emotional distress and mental health issues he
19 has suffered stem from the alleged discrimination that he
20 experienced at the Port Authority.

21 So I understand that plaintiff's counsel is saying
22 they haven't obstructed the attempt to get discovery from the
23 therapists and physicians, but what I'm telling you is if you
24 can't ensure that the necessary documents are provided and the
25 necessary therapists and physicians are not available for

N22CjamC?

1 deposition, it will be difficult for me to permit your
2 emotional distress claim to go forward because defendant is
3 being denied discovery. So you and your client have a direct
4 interest in making sure that defense counsel gets the relevant
5 documents and testimony that it needs in order to explore this
6 issue of whether plaintiff's mental health issues, emotional
7 distress issues are related to the alleged discrimination he
8 suffered or, in fact, relate to other events in his life up to
9 and including the last comment that counsel made, which was
10 that he suffers from post traumatic stress disorder as a result
11 of some experience he suffered in the military.

12 So what I'm hearing from defense counsel is that they
13 want to move forward with the dispositive motion, and we'll
14 talk about that more in just a minute, but I wanted you to know
15 that if we can't resolve these issues about the documents and
16 the testimony, it will be difficult for me to allow your
17 emotional distress claim to go forward.

18 MR. BALESTRIERE: Thank you, your Honor. And that's,
19 frankly, very helpful.

20 Without burdening the Court with all the back and
21 forth between the parties, there were many allegations of
22 discovery misconduct on the part of me and my client. So I
23 just want to say in court now, unless the Court has a different
24 direction, that I then shall or one of my colleagues shall
25 contact those whom the Port Authority is seeking documents from

N22CjamC?

1 and say that they should proceed. Meaning we'll, of course,
2 put it in the context of not providing them legal advice, but
3 discuss how this is an issue that came up and we don't want
4 them to interfere with that.

5 May I say something about the ex-wife' deposition,
6 your Honor, because that would be related.

7 THE COURT: Yes, go right ahead.

8 MR. BALESTRIERE: So I only had the opportunity --
9 forgive me, your Honor. I was on trial before Judge Rochon
10 until I think 5:30 or so yesterday, so I only had the chance to
11 have a long haul with both Sergeant James, the plaintiff, and
12 Colleen Tracy James, his ex-wife, regarding the issue of the
13 deposition. Prior to that time, it was just some emails back
14 and forth.

15 And putting aside insufficient service, lack of
16 notice, I'm not going to make an argument about that. I do
17 oppose a deposition, but that might mean then making the
18 decision to restrict some of the evidence that Sergeant James
19 would present. Specifically, they are not married, but they
20 have a working relationship, you could say. They share a child
21 and it is frankly just putting a lot of stress on that
22 relationship to have to deal with these issues, with all
23 respect to Ms. Tracy James, who has engaged us, too. She was
24 crying last night.

25 They will not, I believe, be able to get into any

N22CjamC?

1 communications that Sergeant James had with Colleen Tracy
2 James. First, they were spouses until very recently; and then
3 second, she's a partner at White & Case, and was, in fact,
4 giving advice until we were hired and, indeed, even after that
5 time. So I suppose she could testify as to her observations,
6 and that would be relevant to the impact that it had on
7 Sergeant James' marriage, but if the Court is saying he could
8 not testify about the impact on his marriage if Ms. Tracy James
9 is not deposed, then I can direct my client to, you know, we
10 can of course raise this in a JPTO if we get to that point,
11 that I will not be able to examine Sergeant James with regards
12 to the impact on his marriage, meaning that may not be the best
13 thing for my client in this case, but I think it's the best
14 thing for my clients in their overall relationship, so I at
15 least wanted to put that out there. But, at this point,
16 because we think it would have a burdensome effect beyond the
17 case and would be of very limited relevance where no
18 communications could be addressed, we oppose the deposition
19 and, if need be, we'll restrict the evidence with regards to
20 the impact on the marriage.

21 THE COURT: Does defense counsel have any reaction?

22 MS. LEE: Your Honor, the only reason we sought to
23 depose the plaintiff's wife was because at his deposition when
24 we asked him what his damages were, he says marriage fell
25 apart. So we believe that we're entitled to question his wife

N22CjamC?

1 about whether that was true and what the status of their
2 marriage was and the actions he was attributing to the Port
3 Authority impacted on them. I don't think there's a privilege
4 argument there.

5 THE COURT: I know you have a lot of things prepared
6 to say, but I'm not --

7 MS. LEE: No, I don't. Actually, your Honor --

8 THE COURT: The issue is they're going to walk away
9 from a claim that his marriage ended because of his treatment
10 at the Port Authority. So, the simple question to you is,
11 given that concession, are you interested anymore in taking her
12 deposition?

13 MS. LEE: No, your Honor, and we've told them that all
14 along.

15 THE COURT: Okay.

16 MS. LEE: Thank you.

17 THE COURT: So that issue is gone.

18 MS. LEE: Thank you, your Honor.

19 THE COURT: We've talked about the issues with the
20 medical records and testimony, and we're going to set a
21 schedule for a resolution of any outstanding discovery.

22 Before I do that, I want to inquire whether everyone
23 here agrees that if I extend the deadline to March 7th, 2023,
24 which is what plaintiff has asked for, do both sides believe
25 that we can complete all of the outstanding matters by that

N22CjamC?

1 time?

2 MR. RAFALAF: I'm not sure, and I'll tell you why --
3 no, because they have not subpoenaed the nonparties. They have
4 not subpoenaed these ten nonparties.

5 THE COURT: How many nonparties?

6 MR. RAFALAF: Ten. Three of them are police officers
7 with the Port Authority, but who are not witnesses identified
8 by the Port Authority in its Rule 26. On its amended Rule 26
9 disclosure, which we received a day or two ago from plaintiff,
10 they do not explain the subject matter of the testimony that is
11 being sought or would be sought or that --

12 THE COURT: Not to cut you off, but how much time do
13 you think would be appropriate?

14 MR. RAFALAF: We don't represent these parties. And
15 so --

16 THE COURT: You know what kind of discovery they want.
17 So taken that into account, you said you don't think March 7th
18 is good enough --

19 MR. RAFALAF: Your Honor, I want to be clear. It's
20 enough time for us, the problem is, is I don't think it's
21 enough time for --

22 THE COURT: So you don't have an opinion. So let me
23 turn to plaintiff's counsel, whether you are confident that you
24 can complete the necessary discovery by March 7th.

25 MR. BALESTRIERE: Yes, your Honor, if I do get the

N22CjamC?

1 cooperation I requested from the Port Authority and if I can
2 explain.

3 So with regards to three of the Port Authority police
4 officers who were noticed in December and who did not appear
5 for scheduled depositions, and I did not know they were not
6 appearing until the day of the deposition and made a record and
7 so forth, our view is they are in the control of the Port
8 Authority. We've seen nothing to give us a contrary view. My
9 understanding, and this, in part, comes from my conversations
10 with the client and growing up with a lot of cops, is that the
11 unions have some kind of agreement with the Port Authority that
12 if any of these individuals are going to be sued or deposed,
13 that they are to get union counsel. Meaning there is some
14 agreement, from what I understand, though I'm not totally sure,
15 between the Port Authority Police Department and the unions
16 that Ms. Lee and Mr. Rafalaf say would not represent them, and
17 that's fine. I had asked for -- I got one name with a phone
18 number on January 20th when I thought we worked out everything.
19 I have received no more information to try to coordinate these,
20 meaning I don't care to pick a fight over who controls whom, if
21 I can just get them to be deposed. So I would at least ask for
22 the Court's instruction that they assist in getting these in.
23 We can get these in if we get the cooperation with the Port
24 Authority.

25 There are five, I think very quick, who I came to

N22CjamC?

1 understand are third-party witnesses that observed an incident.
2 I believe they're all security officers, your Honor, so they
3 are not Port Authority employees. They observed an incident at
4 One World Trade Center. I have also asked, since January 20th,
5 for the contact information so I can at least coordinate
6 formally subpoenaing whoever I must, because I'm not totally
7 sure, just to get them in the office. I think these could be
8 one-hour depositions. So if we get the cooperation of the Port
9 Authority, yes, March 7th will be good enough for us, your
10 Honor.

11 MS. LEE: Can I just respond to the -- the nonparties
12 that he thinks that we control are controlled by Durst at One
13 World Trade --

14 THE COURT: He actually just said he didn't think you
15 control them.

16 MS. LEE: He's been sending us letters and we told him
17 we don't.

18 THE COURT: He just said that there are some security
19 officers. Is that who you're talking about, the security
20 officers?

21 MS. LEE: They're not just security officers, they're
22 employees of Durst. Durst Security, not --

23 THE COURT: Well, it sounds like the security officers
24 that he just referenced and he said he actually didn't think
25 you controlled them, that's what he just said.

N22CjamC?

1 MS. LEE: So -- okay.

2 THE COURT: So what I'm going to do because there's a
3 number of outstanding matters here -- there's the depositions
4 the plaintiff wants to take, there's this problem with the
5 medical records -- I'm going to set a final deadline of
6 March 31st. So any discovery that needs to be taken in this
7 case will have to be completed by March 31st.

8 In the event that the lawyers encounter difficulties,
9 I want to know about it right away. I will try to address the
10 problem, and if I can't, I will refer it to the magistrate
11 judge, who is Judge Gorenstein, and he will resolve it because
12 we need to bring discovery to a close so that we can proceed
13 with a dispositive motion if there's going to be one.

14 So, I will issue an order today that provides for a
15 final fact discovery deadline of March 31st. That order will
16 say that any party seeking to file a dispositive motion will
17 submit a premotion letter in accordance with my individual
18 rules by April 7th, and any response is to be put in by
19 April 14th. After I read your letters, I will either enter a
20 briefing schedule or if it seems productive for us to have a
21 conference at that point, I will schedule a conference and
22 discuss the proposed motion.

23 Let me inquire of defense counsel, because you said
24 you wanted to file a dispositive motion, could you give me some
25 sense of what you expect will be the centerpiece of your

N22CjamC?

1 argument for relief?

2 MS. LEE: Your Honor, the argument would be that
3 there's no hostile work environment. That's one of the claims
4 based on the plaintiff's testimony. The complaint talks about
5 a 2009 incident at a party that had nothing to do with the
6 plaintiff. He was a bystander who says he became involved, but
7 there's no kind of action taken against him. He had no further
8 encounters with one named defendant, McNerney, actually to
9 date. So, to the extent that he's claiming McNerney created a
10 hostile work environment or discriminated against him, it's
11 simply not there.

12 He has a claim in there that he had a direct encounter
13 and was called racist names at an off-duty Christmas party in
14 2019. When that was reported to the Port Authority, it was
15 thoroughly investigated. The Port Authority brought the
16 officer up on charges and recommended that he be terminated
17 because of the procedure that is negotiated between the Port
18 Authority and the PBA. The arbitrator decided that the charges
19 did not merit major discipline, and an arbitrator who is a
20 third-party downgraded them. The Port Authority itself took
21 the position that this behavior was serious and should have
22 been dealt with, but it was constrained because of the
23 contract.

24 With respect to the failure to promote claim, the
25 plaintiff claims that McNerney somehow interfered with his

N22CjamC?

1 detective-sergeant promotion when, in fact, the reason he
2 wasn't promoted to detective-sergeant was because he didn't
3 pass the oral interview, which had nothing to do with McNerney,
4 that a process is administered by the human resources
5 department and the oral interview consists of a panel of three
6 officers who ask him the same questions that all the other
7 candidates are asked and they're rated. His rating was not --
8 he was not recommended, so that is the reason he didn't get
9 promoted.

10 With respect to the other allegation they raise in the
11 complaint is that he was moved out of his command at World
12 Trade Center because he had complained about discrimination.
13 In fact, he was moved out of the command at World Trade Center
14 because he had an off-duty encounter at One World Trade with
15 Durst Security because he was late for his reservation to go up
16 to Legends and have dinner, the kitchen had closed and he was
17 insisting on going up. He had a police officer, an on-duty
18 police officer go over to the building with him. She was
19 witnessing this encounter between him and the Durst Security
20 people at One World Trade. He was saying that he owned the
21 buildings, did they know who he was. It triggered a complaint
22 from Durst to the Port Authority which triggered an
23 investigation by the Office of Inspector General, all of which
24 has been turned over to the plaintiff. And when the
25 superintendent of police received notification of what had

N22CjamC?

1 happened, he had Sergeant James moved to JFK for the good of
2 his service. His union contested that move and in the state
3 court 1975 proceeding, the court said that we were allowed to
4 do what we did.

5 So those are the allegations in the complaint and we
6 believe that all of those are subject to dismissal.

7 MR. BALESTRIERE: Do you want me to redress, your
8 Honor?

9 THE COURT: Sure.

10 MR. BALESTRIERE: The short of it is that there's many
11 things that they say which we deny, and this is not, say, a
12 document case or even some of the findings that Ms. Lee states.
13 I disagree that the findings even say what they do, so that
14 this is not a case ripe for a Rule 56 after motion. I mean, I
15 expect, nonetheless, we'll file one, and if there are premotion
16 conference letters, we can get into more details, but this is
17 one of those he-said, he-said type of cases with regards to
18 say, for example, the incident at One World Trade Center where
19 Sergeant James has a very different explanation or different
20 story, I should say, as to what happened.

21 One comment that there is no claim with regards to the
22 2009 party that Ms. Lee talked about, but that it does provide
23 background for what we believe to be some of the initial
24 animosity between some of the named defendants who are senior
25 supervisors at the Port Authority and Sergeant James.

N22CjamC?

1 I could say more if your Honor wishes, but that's the
2 sum-up of why --

3 THE COURT: No, I don't think it will be profitable or
4 productive to have extended argument.

5 My only reaction to what I heard is that I did hear
6 defense counsel say there was a hostile work environment claim
7 in the case, and given this is a Title VII case, that's going
8 to require proof of pervasive activity. If the plaintiff is
9 going to oppose a motion on that claim, there has to be an
10 evidentiary record that would allow a jury to be able to
11 conclude that the element of pervasive activity is satisfied
12 here. Of course, I'm not familiar with the discovery, so I
13 don't know whether it is or it isn't, but I want to make sure
14 that if we're going to litigate that issue, there is a
15 good-faith basis for concluding that the high standard for a
16 hostile work environment claim is met in this case.

17 MR. BALESTRIERE: Understood, your Honor.

18 THE COURT: So, we have a schedule. We'll enter it in
19 the form of a written order later today. As I said, it is my
20 hope that you can work together cooperatively to finish up the
21 necessary discovery so this case can move forward. If for some
22 reason there's a problem, as I've tried to make clear, I want
23 you to let me know because either myself or the magistrate will
24 get involved quickly to try to resolve the problem so that it
25 doesn't delay the schedule that we've agreed on today.

N22CjamC?

1 MR. BALESTRIERE: May I raise one other issue?

2 THE COURT: Yes.

3 MR. BALESTRIERE: Especially because you frankly have
4 given us a little more time, I don't think we should slow down
5 anything in your Honor's schedule, but I always think that if
6 you can try to resolve a matter, it makes sense. I just tried
7 a case that wasn't resolved, so we see how that goes.

8 I wondered if the Court would consider ordering us to
9 mediation. I have mediated matters before Magistrate Judge
10 Gorenstein before. My only concern, but though I know this
11 imposes a cost on the parties, is that the magistrates don't
12 tend to have the time that a private mediator does, so I might
13 suggest a private mediator. I'm hardly going to ask the Court
14 to order a private mediator, but I do think that if we could
15 try to mediate it, we have talked and that hasn't gone
16 anywhere, that that could resolve it. And, at a minimum, if we
17 all go forward, we know we really tried.

18 THE COURT: Let me give you my reaction. First of
19 all, as you know, we do have the court, meaning this district
20 has a mandatory mediation program for employment cases. But,
21 separate and apart from that, I don't force people to go to
22 mediation or to a settlement conference. If there's interest
23 in both sides, I encourage that and, to state the obvious, if
24 both sides agree to that a settlement conference before Judge
25 Gorenstein might be productive, nothing would make me happier

N22CjamC?

1 than to do a referral to him for that purpose.

2 My reaction is, as we talked about at the outset of
3 the conference, there is this claim for emotional distress
4 damages. Defense counsel leads me to believe that they think
5 that whatever emotional distress plaintiff might be suffering
6 is attributable to other causes, and so I wonder about whether
7 it's premature at this point to have a settlement discussion
8 because there's still not a clear understanding of the facts.
9 So, what I wonder about is whether the appropriate time for a
10 settlement conference or a mediation might be when some of this
11 outstanding discovery has been completed and the parties have a
12 better sense of what the facts actually are than they do today.
13 That's my reaction. As I said, if both sides feel at any point
14 between now and when we see each other again or when the
15 premotion letters come in, that it might be productive to have
16 a settlement conference or mitigation, let me know, and
17 anything I need to do to facility that, of course I'm happy to
18 do.

19 MR. BALESTRIERE: Thank you, your Honor.

20 THE COURT: All right. Anything else?

21 (Pause)

22 Thank you, all. Have a good day.

23 * * *